IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*
Respondents,

SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND SOUTHERN GOVERNORS' CONFERENCE
Intervenors-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INTERVENORS-RESPONDENTS SOUTHEASTERN ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AND SOUTHERN GOVERNORS' CONFERENCE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CARL E. SANDERS
JOHN L. TAYLOR, JR.
1400 Candler Building
Atlanta, Georgia 30303
Attorneys for Intervenors-Respondents Southeastern Association of Regulatory Utility Commissioners and Southern Governors' Conference

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PRELIMINARY STATEMENT

The Southeastern Association of Regulatory Utility Commissioners ("SEARUC") and the Southern Governors' Conference ("SGC"), intervenors-petitioners

in the proceedings before the Court of Appeals below, appear in support of the Court of Appeals' decision and urge that the Petition for Writ of Certiorari brought by The Long Island Rail Road Company ("Long Island") be denied.

SEARUC is composed of the commissioners of the regulatory commissions of the Southern States. SGC is the organization of Southern Governors, who meet regularly to consider and take action upon matters that affect the public interest of their States. SEARUC and SGC represent the following states in this proceeding: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

SGC was formed to combat regional discrimination against the South in railroad freight rates, and actively participated in the *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945), and in the landmark case of *New York v. United States*, 331 U.S. 284 (1947), in which this Court confirmed the principle of regional rate equality. SGC and SEARUC were also parties to the proceedings in *Official-Southern Divisions*, 325 I.C.C. 1 (1965), where they successfully argued that the Interstate Commerce Commission's ("ICC") prescription of an increase in the North's divisions was not supported by reasoned findings because the purportedly higher Northern costs of service were improperly inflated by Northern commuter deficits. *Aberdeen & Rockfish R.R. v. United States*, 270 F. Supp. 695 (E.D. La. 1967), *aff'd Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968). SGC and SEARUC intervened in the present proceeding because Long Island's "terminal surcharge" represented another assault on the principle of regional equality and yet another attempt to reduce the divisions of Southern railroads, to the detriment of the Southern economy, in order to subsidize local suburban commuter operations in the North.

ISSUE PRESENTED

The issue before this Court is whether the Court of Appeals erred in setting aside an order of the ICC permitting Long Island to recoup increased retirement tax costs attributable almost entirely to its local commuter operations by means of a "terminal surcharge" on interstate freight traffic on the ground that the ICC's order unlawfully changed Long Island's share or "division" of joint rate revenues vis-a-vis railroads in other regions in the absence of findings necessary to support that result.

SEARUC and SGC contended before the Court of Appeals below that railroad retirement tax costs incurred by a state-owned commuter railroad in providing local transportation service to commuters who work in New York City and live on Long Island cannot, consistent with Section 15(6) and Section 15a(4)(c) [now Section 15(a)(6)(c)] of the Interstate Commerce Act and with the decision of this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968), be imposed on the shippers and economies of other areas of the country through the device of a "terminal surcharge" which in economic reality changes the divisions which Southern railroads receive on freight traffic to and from Long Island.

The Court of Appeals agreed and held that Long Island's terminal surcharge changes the joint rates and

divisions of the railroads serving the North and South (App. A 15a). The Court of Appeals recognized that under the existing uniform rate and divisions structure established by the ICC in *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945), and affirmed by this Court in *New York v. United States*, 331 U.S. 284 (1947), "the Northern and Southern railroads receive the same share of revenue for the same amount of service." (App. A 5a) and that this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968) "made it clear that a departure from the equal-factor basis of divisions of joint rates can be allowed only on the basis of specific findings" (App. A 14a-15a).

It having been conceded in the Court of Appeals below by counsel for the ICC that no such findings had been made by the ICC in the case before it, the Court of Appeals rejected as "totally unrealistic" the contention that such findings were not required because Long Island's terminal surcharge was an "add-on" charge and not a modification of the divisions (App. A 15a).

ARGUMENT

In this Court, Long Island essentially abandons the argument which it made before the ICC and Court of Appeals (and which the Court of Appeals rejected as "totally unrealistic") that its terminal surcharge is an "add-on" charge rather than a change in divisions. Long Island now expressly concedes that the ICC approval of the surcharge had "the economic effect of altering the division of total transportation charges" (Petition for Certiorari, p.18).

Instead, Long Island now seeks to defend its terminal surcharge on the grounds that the pertinent provisions of the Railroad Retirement Amendments of 1973 somehow relieved the ICC of its obligation to make the findings required by Section 15(6) of the Interstate Commerce Act and by the holding of this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968) (Petition for Certiorari, p. 18), and, alternatively, that the ICC made findings "on the divisions point" which were sufficient to justify a change in Long Island's divisions (Petition for Certiorari, p. 19). These arguments, which have not hitherto been made in this proceeding either by Long Island or by the I.C.C.,[1] are totally without merit.

First, there is nothing whatever either in the provisions of the Railroad Retirement Amendments or in their legislative history which suggests that in approving a final rate increase under Section 15a(4)(c) to permit the nation's railroads to recoup increased retirement tax costs, the ICC could change existing divisions without compliance with Section 15(6) of the Interstate Commerce Act or with the decisions of this Court construing Section 15(6). Indeed, Section 15a(4)(c) — by the clearest possible contrast to Section 15a(4)(b), which provided for approval of interim rate increases "notwithstanding any other provisions of law" — requires that such final rates be determined "under the standards and limitations applicable to ratemaking generally [under the Act]." Hence, Long Island's claim that "[t]he ICC's mandate in this case permitted it to approve permanent rate increases that have the economic effect of altering the division of total

[1] Although a statutory respondent before the Court of Appeals under 28 U.S.C. § 2322, the United States did not seek to defend the ICC's order there, and the ICC has not sought review of the Court of Appeals' decision before this Court.

transportation charges" (Petition for Certiorari, p. 18) is directly contrary to the express statutory terms of Section 15a(4)(c).

Second, far from making findings "on the divisions point" adequate to justify a change in Long Island's divisions, the Commission made *none* of the findings required by Section 15(6) of the Interstate Commerce Act, which provides the sole and exclusive means whereby the ICC may prescribe a change of divisions. Section 15(6) authorizes the ICC to prescribe changed divisions *only* when it has given "due consideration" to a number of specific factors, including "the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses . . . and the importance to the public of the transportation services of such carriers." Indeed, as the Court of Appeals observed, the ICC did not even *attempt* to make such findings because of its erroneous assumption, no longer defended even by Long Island, that the surcharge did not constitute a modification of the joint rates.

Nor did the ICC make any findings to justify the imposition of retirement tax costs related solely to local suburban commuter operations onto the freight shippers and economies of other areas of the country as required by the decision of this Court in *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968). In that decision, this Court affirmed the judgment of a three-judge district court that the ICC could not impose the burden of Northern commuter costs on the South in the absence of findings "rationalizing the conclusion that suburban passenger deficits reflecting costs not common to freight service, but 'solely related'

to suburban passenger service, can or should be treated as a cost of North-South freight traffic," *Aberdeen & Rockfish R.R. v. United States*, 270 F. Supp. 695, 708 (E.D. La. 1967), and held that if such a discriminatory shifting of Northern commuter costs were to be permitted "the class rate discrimination in favor of the North and against the South which we condemned in *New York v. United States*, 331 U.S. 284, could well flourish in another form." *Baltimore & O.R.R. v. Aberdeen & Rockfish R.R.*, 393 U.S. 87, 92(1968). It is undisputed that by far the greater portion of Long Island's increased retirement tax costs are solely related to its commuter operations which produce more than ninety percent of its total revenues (Petition for Certiorari, p.4). And it is also undisputed that Long Island's terminal surcharge imposes such costs upon the movement of freight in the South and in other regions of the country. Yet the ICC's report is totally silent as to what, if anything, could justify such a result and thus fails to meet the requirement of "rationalizing" findings affirmed by this Court.

In its Petition, Long Island also attacks the escrow requirement imposed by the Court of Appeals as a condition to Long Island's continued collection of its terminal surcharge revenues on an "interim" basis pending remand to the ICC and, in the alternative, to its request for writ of certiorari to review the decision of the Court of Appeals, requests this Court "summarily [to] reverse the decision of the Court of Appeals insofar as that decision deprives [Long Island] of the use of the proceeds of the interim surcharge" (Petition for Certiorari, p. 2).

To grant the alternative relief requested would be

fundamentally unfair. It would permit Long Island to continue to benefit from what the Court of Appeals already held to be an unlawful inflation in its divisions and thus to continue unlawfully to burden the economy of the South. The Court of Appeals required Long Island to keep its "interim" surcharge revenue in a trust fund as an equitable alternative to simply striking down the surcharge found to be unlawful. This arrangement protects all prospective claimants to the surcharge revenues collected pending a final disposition by the ICC on remand, including Long Island. Long Island is a beneficiary of the action of the Court of Appeals, and should not now be heard to complain of an equitable condition that enables Long Island to continue to collect its unlawful surcharge pending further proceedings before the ICC on remand.

CONCLUSION

For the foregoing reasons, Long Island's Petition for Writ of Certiorari to review the decision of the Court of Appeals, and its request in the alternative that the trust fund requirement imposed by the Court of Appeals on the interim collection of surcharge revenues be summarily reversed, should be denied.

Respectfully submitted,

CARL E. SANDERS
JOHN L. TAYLOR, JR.

1400 Candler Building
Atlanta, Georgia 30303

Attorneys for Intervenors-
Respondents Southeastern
Association of Regulatory
Utility Commissioners and
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